BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	
Revision of Rules and Policies for the Direct Broadcast Satellite Service	IB Docket No. 95-168 PP Docket No. 93-253

COMMENTS OF TIME WARNER ENTERTAINMENT CO., L.P.

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EXECUTIVE SUMMARY

The Commission's Notice proposes that an intricate set of structural and behavioral safeguards be implemented to prevent the exercise of undue market power by MSO-affiliated companies entering the DBS industry. As an initial matter, TWE opposes the consideration of such complex and contentious issues as part of a proceeding primarily dedicated to the allocation of DBS spectrum through competitive bidding. Any consideration of anti-competitive measures, if necessary at all, should be done pursuant to a separate, thorough proceeding.

However, to the extent the Commission does consider imposing structural and behavioral restrictions on MSO participation in the DBS market, TWE submits that, given the current status of the MVPD market, such safeguards are demonstrably unnecessary, unjustified, and unlawful. Specifically, the Notice ignores the following:

- The DBS industry currently exhibits a high level of healthy competition. The Commission has not provided any reason why the safeguards currently found in FCC regulations, as well as the numerous antitrust and anti-competitive practice remedies available to other government entities, are insufficient to maintain the current competitive conditions.

- The imposition of new behavioral and structural regulations on MSO-affiliated DBS companies is contrary to previous determinations of both Congress and the Commission. The Commission lacks the authority to now ignore these findings absent compelling circumstances.

- Economic and market analysis reveals that erecting behavioral and structural barriers to DBS market entry would fail to serve a cognizable public interest.

In addition, the Notice proposes to implement the structural and behavioral safeguards through the imposition of attribution standards more restrictive than those imposed on other video delivery media. As recent federal court decisions have demonstrated, such a deviation from the less restrictive measures previously employed by the Commission would be unlawful without a definitive demonstration why such measures are necessary.

The Commission should not take the extraordinary step of limiting participation in the emerging DBS industry by adopting new regulations which have the effect of restricting competition without a clear demonstration that such regulation is absolutely necessary to the health of the MVPD market.

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Time Warner Entertainment Company, L.P. ("TWE") hereby submits these comments in the Commission's Notice of Proposed Rulemaking in the above referenced proceeding(the "Notice").[1]

I. INTRODUCTION AND SUMMARY

The primary purpose of the Notice is to establish Commission policies regarding the allocation of spectrum for the provision of direct broadcast satellite service ("DBS"). However, the Commission also proposes a set of complex behavioral and structural safeguards to restrict the participation of cable operators and other multi-channel video programming distributors ("MVPD"s) in the DBS market. Specifically, the Notice considers (1) whether the Commission should limit the control and use of DBS facilities by cable operators and other MVPDs; (2) whether the Commission should adopt marketing and access restrictions

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[1] In the Matter of Revision of Rules and Policies for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking in IB Docket No. 95-168 and PP Docket No. 93-253, FCC 95-443 (released October 30, 1995).

similar to the cable program access rules to restrict participation in the DBS market by entities affiliated with multiple system operators ("MSO"s) and other MVPDs; and (3) what attribution standards should be used to implement these restrictions.

As an initial matter, TWE notes that these competitive issues raise concerns separate and distinct from the Notice's primary focus of DBS spectrum allocation. In order to implement similar restrictions on the cable industry, the Commission recently completed two separate and extended proceedings.[2] Based on the complexity of the issues raised in the cable context, the Commission should not endeavor to resolve similar issues for the DBS industry as an ancillary consideration in a proceeding primarily dedicated to competitive bidding and spectrum allocation concerns. To do so, particularly on the Commission's proposed time schedule, would fail to afford adequate consideration to the serious implications of the structural and behavioral regulations the Commission seeks to implement. Thus, TWE agrees with Commissioner Barrett[3] that the Commission should undertake any proceeding to address competitive issues, if

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[2] Program access rules for cable were adopted in MM Docket No. 92-265. See First Report and Order, 8 FCC Rcd. 3359 (1993). Ownership restrictions for cable operators were adopted in MM Docket No. 92-264. See First Report and Order, 8 FCC Rcd. 6828 (1993).

[3] See Notice, Statement of Commissioner Andrew C. Barrett, Dissenting in Part and Concurring in Part at 2 ("I am concerned that the Commission not revisit issues, such as our program access rules, that should be reviewed, and if appropriate, modified in an independent proceeding.").

necessary at all, at a time when separate and careful review of the concerns raised will be possible.

However, in response to the Commission's request for comment, TWE opposes the regulatory measures proposed by the Notice for the following reasons:

- The DBS industry currently exhibits a high level of healthy competition. The Commission has not provided any reason why the safeguards currently found in FCC regulations, as well as the numerous antitrust and anti-competitive practice remedies available to other government entities, are insufficient to maintain the current competitive conditions.

- The imposition of new behavioral and structural regulations on MSO-affiliated DBS companies is contrary to previous determinations of both Congress and the Commission. The Commission lacks the authority to now ignore these findings absent compelling circumstances.

- Economic and market analysis reveals that erecting behavioral and structural barriers to DBS market entry would fail to serve a cognizable public interest.

In addition, the Commission proposes to implement the Notice's structural and behavioral safeguards through the imposition of attribution standards more restrictive than those imposed on other video delivery media. Such an unjustified deviation from the Commission's previous policy determinations would be unlawful without a definitive demonstration why such measures are necessary. In absence of a clear record of abuse, the Commission should not take the extraordinary step of limiting participation in the emerging DBS industry by adopting new regulations which have the effect of restricting competition.

II. STRUCTURAL AND BEHAVIORAL REGULATION OF MSO-AFFILIATED DBS COMPANIES IS UNWARRANTED AND UNNECESSARY.

A. The DBS Marketplace Is Highly Competitive.

The Notice indicates that the imposition of behavioral and structural safeguards may be necessary "in order to promote competition."[4] This tentative conclusion ignores the fact that the DBS industry has achieved an astounding level of competition since its inception in early 1994. Consumers purchased over one million DBS dishes in their first year of availability, making them **the fastest selling consumer electronics product ever**.[5] It is expected that DBS will have approximately 2 million subscribers by the end of 1995,[6] **an estimated two-thirds of which are present or former cable subscribers**.[7] 77 percent of these converted cable customers represent the cream of the MVPD consumer market, spending an average of $38 per month for multichannel video service.[8] This success bodes well fo the future of the DBS business as DBS dishes continue to become more

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[4] Notice at ¶ 33.

[5] "DBS Sales Likely Will Jump Again Following Launch Of Sony Dish," Video Technology News, May 22, 1995,

[6] "One Million for DirecTv," SkyReport, November, 1995, p. 6.

[7] See In the Matter of Annual Assessment of the Status of Competition in the Market of Delivery of Video Programming, CS Docket No. 95-61, "Comments of DirecTv," filed with the Commission on July 3, 1995 at 5-6.

[8] "Cable Cos Beware: DTH To Cause Double Digit Sub Loss For Some Systems," CableFAX, April 20, 1995.

affordable.[9] For these reasons, a Phillips Business Information report recently substantiated that DBS should easily obtain a firm grasp over 10 percent of the MVPD market and could obtain penetration levels as high as 25 percent.[10] General Motor's DirecTv alone expects to garner 10 million subscribers by the year 2000.[11] There can be no question that DBS has already firmly established itself as a vibrant competitor in the MVPD market.

This explosive growth will be further strengthened by the imminent entry of additional DBS operators. There are two companies (DirecTv and USSB) currently providing high power DBS service and another five currently hold permits to construct DBS facilities (Continental, EchoStar/Directsat, Tempo Satellite, Dominion, and DBSC).[12] As the Commission has previously determined, all of the current permittees hold substantial operating assets and have exhibited the financial and commercial promise to be effective DBS competitors.[13] Indeed, the participation of only a small number of the current permittees

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[9] See "DBS Sales Likely Will Jump Again Following Launch Of Sony Dish," supra.

[10] "Cable and Telcos Prepare to Wage War On DBS," Interactive Video News, May 29, 1995 at 1.

[11] DirecTv Comments, supra, at 5-6.

[12] Notice at ¶ 42, n. 75.

[13] See Continental Satellite Corporation, et al., 4 FCC Rcd. 6292, 6295-97 (1989)("Continental"). See also "Between the Lines: DBS Disagreements Emerge," Cablevision, Nov. 14, 1994 at 6 (estimating that the MVPD market could support up to seven competitive DBS services).

has already resulted in the establishment of three highly competitive direct-to-home satellite services: USSB, DirecTv and Primestar, with Echostar and Alphstar poised to offer service by the end of the year. The Commission is also taking steps to further facilitate the introduction of more market participants by securing additional DBS resources from the International Telecommunications Union.[14] These additional participants will only serve to increase consumer choice.

Other technologies will also contribute to the competitive mix of DBS services. The Commission already has granted NorSat a license to provide video services on the Ka-band and has pending before it applications from a number of powerful communications companies proposing to provide direct satellite video, including General Electric, PanAmSat, Loral, and Orion.[15] These Ka-band service providers will be capable of delivering interactive services not feasible on the Ku-band and should further the competitive effect of satellite video on the MVPD market.

As this record shows, there is no demonstration that MSO-affiliated DBS companies have inhibited DBS competition, much less any evidence to require the blanket structural and behavioral regulations proposed in the Notice. Indeed, of all the DBS and satellite video delivery market participants listed

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[14] Notice at ¶ 52.

[15] See "Satellite Policy Branch Information: Ka-Band Satellite Applications Accepted For Filing; Request For Comment on Ka-Band Feeder Link Application," Public Notice, DA 95-2273 (released November 1, 1995).

above, only one -- Primestar -- is affiliated with a non-DBS MVPD. The Commission offers no rationale why this level of participation necessitates sweeping restrictions on MSO participation in DBS. If anything, the reactions of DBS operators to the competitive challenge of Primestar thus far indicate that competing DBS operators are more than capable of meeting the competition an MSO-affiliated DBS operator might provide. Indeed, in discussing USSB's unprecedented marketing success thus far, one DirecTV - USSB spokesperson has affirmatively stated that Primestar is "not a threat" to their ability to compete in the DBS marketplace.[16] This is consistent with the Commission's own conclusion that cable participation in DBS would only have a positive, not a negative, competitive effect.[17]

The inability of MSOs to harm the DBS market is consistent with the growing level of competition in the larger MVPD market in which DBS operates. As has been recently submitted before the Commission, the MVPD industry faces new and challenging sources of competition, including video dialtone, MMDS, and multichannel

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[16] "USSB's DBS Customer Satisfaction Hits Whopping 88 Percent," Video Technology News, April 10, 1995 (documenting the highly effective marketing strategies of the current DBS operators). See also "Dueling Dishes; First Signs Of Competition Between Primestar and DirecTV - USSB," MEDIAWEEK, April 17, 1995, p. 12 (noting the successful competitive approaches being taken by the current DBS operators and the fact that DirecTV sees Primestar as merely one of many potential competitors).

[17] Continental at 6299 (Commission noting the positive competitive effect possible through MSO entry into the DBS market).

broadcast services.[18] In recognition of the growing and increasing level of competition in the MVPD market, there has been a general trend toward **removing** regulatory barriers to participation in the video marketplace. For example, in approving a bill which would largely deregulate the telecommunications industry, the House Committee on Commerce found that current market conditions and "the need to ensure the United States' competitive position internationally, and the need to promote competition in the video market" justify the removal, not the erection, of entry barriers.[19] The Commission also recently recognized that increased and innovative competition in the MVPD market has created circumstances to warrant the removal

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[18] As of the end of 1994, the Commission had before it applications for video dialtone service covering 8 percent of the country. See Speech of Chairman Reed E. Hundt Before The Washington Cable Club, 1994 FCC LEXIS 6565 (December 20, 1994). The first permanent commercial video dialtone system was recently initiated in Dover Township, New Jersey, capable of delivering up to 384 channels of video capacity. See Waiver of the Commission's Rules Regulating Rates For Cable Services ("VDT Waiver Order"), FCC 95-455, ¶ 6 (released November 6, 1995). In addition, wireless cable has emerged as an affordable and accessible competitor to cable television with a projected to gain 1.5 million subscribers by 1997 and 3.4 million by the year 2000. Paul Kagan Associates, Wireless Cable Investor, October 24, 1994. The Commission has also noted the emergent competitive effect of broadcast multichannel services now capable of offering 6 video feeds over the current frequencies controlled by a single broadcast station. See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry in MM Docket No. 87-268, FCC 95-315, ¶ 4, 23 (released August 9, 1995).

[19] H. Rep. No. 104-204, 104th Cong., 1st Sess. 53 (1995).

of pricing restrictions on cable operators.[20] These deregulatory trends provide perhaps the most significant indication of the MVPD market's increasingly competitive nature.

B. There Is No Legal Basis For Imposing Behavioral And Structural Regulations On MSO Companies.

The imposition of the structural and behavioral safeguards proposed in the Notice is neither necessitated by, nor consistent with, the intent of Congress. In passing the 1992 Cable Act, Congress imposed all the structural and behavioral restrictions it felt necessary to ensure that consumers and programmers are not harmed by undue market power of cable operators.[21] These included vertical and horizontal ownership limits,[22] restrictions on cable ownership of certain types of MVPDs,[23] restrictions on cable operator activities in conjunction with affiliated program vendors,[24] and sweeping measures to prevent anti-competitive activities by programmers vertically integrated with cable operators.[25] In doing so, Congress made a clear statement that further restrictions were unnecessary and **should not** be imposed upon cable operators. For example, had Congress intended to

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[20] See VDT Waiver Order, supra; Tel-Com, Inc., 10 FCC Rcd. 2114 (1995).

[21] 1992 Cable Act, § 2(b)(5).

[22] 47 U.S.C. § 533.

[23] Id.

[24] 47 U.S.C. § 536.

[25] 47 U.S.C. § 548.

restrict cable ownership of DBS entities, it could easily have included such a proscription with its restrictions on cable ownership of SMATVs and MMDS. However, Congress chose not to do so.[26]

Consistent with this congressional intent, the Commission also previously determined that the behavioral and structural safeguards proposed by the Notice are not in the public interest. Specifically, the Commission has consistently chosen not to impose cable-DBS cross ownership limits.[27] The Commission correctly concluded that such limitations would weaken, rather than empower, the DBS market:

> [I]n fact, [cable] participation could well accelerate the initiation of DBS service by bringing valuable marketplace experience and presence and possible enhancing access to programming ... existing antitrust law and Commission oversight are sufficient to prevent any conduct that is illegal or deleterious to the DBS industry and its customers, or to operators and customers in other the video entertainment distribution industries as well.[28]

Similarly, the Commission recently found that, in passing the 1992 Cable Act, Congress did not intend, and the public interest did not require, that the program access rules and other behavioral restrictions on cable operators be extended to the DBS

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[26] See 2A Norman J. Singer, Sutherland Statutory Construction § 47.23 (1992) (describing the maxim of *expressio unius est exclusio alterius* which holds that when a defined and identifiable conduct is proscribed by statute, conduct not proscribed is considered to be intended as sanctioned). See also Department of Air Force v. Federal Labor Relations Authority, 877 F.2d 1036 (D.C. cir. 1989).

[27] See Continental at 6299.

[28] Id.

market.[29] Nothing has changed since the Commission's initial determination of these matters other than the fact that the DBS market has grown more competitive. Absent an identifiable rationale for a shift in policy, the Commission may not legally ignore these prior determinations.[30]

C. There Is No Policy Rationale For Imposing Behavioral and Structural Regulations On MSO-Affiliated DBS Companies.

The behavioral and structural measures proposed in the Notice are equally unjustified as a matter of public policy. Indeed, the realities of the DBS market demonstrate that such measures would do more harm than good. Thus, the Commission fails to articulate a government interest sufficient to justify imposing such restrictions on MVPDs.[31]

1. Behavioral Regulation -- Program Access

The Notice considers imposing on MSO-affiliated DBS operators restrictions similar to the program access rules for the purpose of ensuring "that competing providers are not denied

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[29] In the Matter of Implementation of the Cable Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order On Reconsideration Of The First Report And Order in MM Docket No. 92-265, 10 FCC Rcd. 3105, 3123 (1994) ("Program Access Recon.").

[30] See, e.g., Greater Boston Television Corporation v. F.C.C., 44 F.2d 841, 852 (D.C.Cir. 1970) ("an agency changing its course must supply a reasoned analysis" for why the prior policy is not being followed).

[31] See, e.g., Turner Broadcasting System v. F.C.C., 114 S.Ct. 2445 (1994) (as an entity with First Amendment rights, restictions which affect the speech of cable systems may not be imposed without serving a substantial government interest).

access to programming."[32] As an initial matter, TWE notes that such access rules have never been proven desirable or necessary to maintain an open and competitive programming market. Economic analysis demonstrates that the presence of vertical integration in the programming market produces numerous efficiencies in the distribution, production and cost of creating high quality programming options.[33] These advantages do not create substantial incentives for MVPDs to prevent competitors from obtaining the same programming. Indeed, antitrust law has widely recognized that most forms of vertical integration should be considered *per se* lawful.[34] There is simply no basis for any presumption that vertical relationships in the MVPD market will affect access to video programming.

However, to the extent there may be some potential for anti-competitive behavior, the Department of Justice and 40 state attorneys general have entered into consent decrees with Primestar to prevent such activity.[35] Thus, the DOJ and the state attorneys general, experts on antitrust issues, already

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[32] Notice at ¶ 57.

[33] Moreover, these advantages may not be reasonably duplicated through contract or other means. See O.E. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications, New York: Free Press, 1975.

[34] See 3 Areeda and Hovenkamp, Antitrust Law ¶ 725 (1978).

[35] United States of America v. Primestar Partners, L.P., 1994-1 Trade Cas. (CCH) ¶ 70,762 (S.D.N.Y. 1994). See also State of New York ex. rel. Abrams v. Primestar Partners, L.P., 1993-2 Trade Cas. (CCH) ¶ 70,403-404 (S.D.N.Y. 1993).

have remedied the problem the Notice now seeks to prevent. The Commission has given no reason why DOJ actions are inadequate to address all antitrust concerns. In this period of increasingly limited government resources, the Commission should refrain from regulation which overlaps with antitrust enforcement, especially when such enforcement has already taken place.[36]

In addition, the Commission's prior actions also duplicate the program access measures proposed in the Notice. Whether necessary or not, the Commission's cable program access rules are already in place and more than adequately protect the interests of DBS service providers. These rules restrict cable affiliated programmers from discriminating against MVPD providers and prohibit cable operators from exerting anti-competitive influence on the decisions of vertically integrated programmers.[37] The Commission has found that these restrictions have effectively prevented the activity feared by the Notice. As the Commission stated in its 1994 Competition Report, since the implementation of the Commission's cable program access rules, competing MVPDs "have not complained about widespread unavailability of

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[36] See, e.g., Hawaiian Telephone Company v. F.C.C., 498 F.2d 771, 776 (D.C.Cir. 1974)(enforcement of the antitrust laws or equalizing competition "is not the objective or role assigned by law to the Federal Communications Commission"). See also The Progress and Freedom Foundation, "The Telecom Revolution -- An American Opportunity," May 30, 1995, p. 49 (in generally noting the abundant FCC actions which wastefully duplicate antitrust laws, the authors noted that the FCC "generally forbid[s] more than is necessary, particularly when markets are changing fast, and thus suppress[es] more competition than [it] promote[s]").

[37] 47 C.F.R. § 76.1002.

programming to distributors competing with cable operators."[38] Specifically, the Commission noted that DirecTv found that the current cable program access rules were sufficient to ensure the development of competition to cable.[39]

The Commission's finding that non-MSO affiliated DBS programmers have sufficient access to programming is borne out by the current market evidence. Non-MSO affiliated DBS operators have freely advertised that they carry all the programming that cable operators currently provide and more, including vertically integrated cable program services.[40] The high level of success in gaining programming exhibited by non-MSO affiliated DBS operators belies the notion that cable affiliated programmers will somehow engage in anti-competitive activity to prevent non-cable entities from obtaining programming. Indeed, despite the competitive presence of a cable-affiliated direct-to-home satellite operator, two vertically integrated cable programming vendors, HBO and Showtime, entered exclusive distribution

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[38] In the Matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report in CS Docket No. 94-48, 9 FCC Rcd. 7442, 7528 (1994).

[39] Id.

[40] Indeed, the USSB basic package includes cable-affiliated programmers Nickelodeon, MTV, VH-1, and Lifetime at the highly competitive price of $7.95. "USSB's DBS Customer Satisfaction Hits Whopping 88 Percent," supra. See the national advertisement for DirecTV heralding its carriage of all "cable favorites" plus a plethora of programming not available on cable, attached hereto.

agreements with USSB, a non-affiliated DBS operator.[41] The ability of non-cable DBS operators to obtain programming has been most pronounced in the area of sports programming, where non-MSO affiliated DBS operators have been able to obtain significant exclusive programming rights.[42] In light of these facts, the regulations proposed in the Notice are clearly unwarranted.

2. Behavioral Regulation -- Marketing Limits.

The Notice also considers restrictions on the marketing activities of MSO-affiliated DBS operators. Specifically, the Commission proposes: (1) restricting non-DBS MVPD affiliated DBS operators from offering DBS as an ancillary service to its cable services, or providing DBS services to its affiliated cable subscribers on terms more favorable than those offered to other customers; and (2) that no DBS operator be allowed to sell, lease, or otherwise provide transponder capacity to any entity that has an arrangement with an MVPD operator, granting that operator the exclusive right to distribute DBS services within, or adjacent to, its service area.[43] The Commission states that such measures are necessary to ensure that DBS services are offered to consumers in competition, and not in collusion, with

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[41] Program Access Recon. at 3110-3111.

[42] See "DirecTV Reaches Deal With Rainbow," Multichannel News, May 22, 1995, p. 47 (documenting that, despite the presence of cable-affiliated sports programmers, the only sports service which had yet to enter agreements with DirecTV were two non-MSO affiliated services).

[43] Notice at ¶¶ 55-56.

cable services.[44] Again, the Commission is offering regulatory solutions where there is no evidence of a problem.

First, the Commission already has placed the exact same marketing restrictions on the only high-power DBS permit holder with significant non-DBS MVPD affiliation -- Tempo.[45] The Commission has provided no indication that other MSO-affiliated entities are affecting the DBS market in a manner which would justify the expansion of these restrictions. In fact, as demonstrated above, DBS operators currently carry much the same programming cable systems carry and other programming as well. As a result, DBS has been quite effective at competing with cable operators. Despite the presence of a cable-affiliated DBS operator, there simply has been no evidence of the abuses the Notice seeks to prevent.

More importantly, the marketing restrictions proposed by the Commission would have a deleterious effect on the ability of DBS operators to compete with other MVPD providers. The ability to differentiate, package, and position program services in the market is as important a factor in competing and meeting consumer needs as price.[46] The imposition of marketing regulations which

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[44] Id. at ¶ 56.

[45] Tempo Satellite, Inc., 7 FCC Rcd. 2728, 2731 (1992).

[46] Both Congress and the Commission have recognized this principle at several junctures. For example, Congress passed the tier buy-through prohibition precisely for the purpose of allowing for more consumer choice of program packages. 47 U.S.C. § 543(b)(8). In addition, the Commission has recognized the advantages of being able to offer differing and varied packages (continued...)

require a homogenization of the MVPD product will only detract from the programming options which DBS operators and other MVPDs would offer to the competitive mix. The ability of DBS operators to offer unique and diverse programming options such as out-of-market sports pay-per-view is one of the reasons DBS has enjoyed such initial success.[47] Limiting the freedom of DBS operators and other MVPDs to similarly segment themselves in the future will only result in less competition and less consumer choice. Consistent with its mandate to rely on competitive forces in providing the widest diversity of programming sources to the public,[48] the Commission should leave MVPDs free to differentiate based on the quality, type, and mix of services.

3. Structural Regulation

The Notice also proposes to impose strict limitations on the control and use of DBS spectrum. Most significantly, the Notice proposes to limit common control of full-CONUS channels to 32 of

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[46](...continued)
of video programming in formulating its *a la carte* and new product tier policies. See In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration in MM Docket No. 92-266, 10 FCC Rcd. 1226 (1994).

[47] See "Ten Percent of Cable Subscribers Believe They Are Extremely Vulnerable To DBS," Video Technology News, June 19, 1995 (DBS consumers cite the presence of more package options as one of the prime reasons for preferring DBS to cable).

[48] 1992 Cable Act § 2(b) ("It is the policy of Congress in this Act to . . . promote the availability to the public of a diversity of views and information through cable television and other distribution media" and "rely on the marketplace, to the maximum extent feasible, to achieve that availability.").

the present 256 channels available.[49] Such limits would be imposed on both the permittees who control the channels and the operators who use the channel capacity.

This proposal to limit DBS channel concentration to less than 15 percent of the total channel capacity available has no economic justification. Such a proposed ownership cap is far below the level which has been demonstrated to have the potential of causing economic harm. Antitrust analysis reveals that there is no reason to believe that market shares below 50 to 60 percent are sufficient to confer anti-competitive power.[50] Under this standard, limiting ownership of the DBS segment of the MVPD market to 15 percent is clearly excessive and cannot be supported without substantial economic justification.[51] Such a low limit would only deprive DBS operators of the significant efficiencies in pricing, distribution, and production which can be achieved through horizontal concentration of markets.[52] Because the

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[49] Notice at ¶ 41.

[50] Areeda and Hovenkamp, Antitrust Law 548-549 (1992 Supp.). The jurisprudence in monopsony cases reaches similar conclusions. See, e.g., United States v. Syufy Enterprises, 903 F.2d 659, 663-71 (9th Cir. 1990) (single firm market shares variously calculated at 39 to 75 percent deemed insufficient to confer monopsony power).

[51] See Cincinnati Bell Telephone, et at. v. F.C.C. et al., Nos. 94-3701/4113; 95-3023/3238/3315, slip op. (6th Cir. November 9, 1995) (the Commission must provide a substantial economic justification for why its declines to adopt less restrictive ownership limitations).

[52] The Commission has openly recognized these advantages in the cable context. See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, (continued...)

Commission has failed to articulate any cognizable harm in the DBS market, the Commission should refrain from unnecessary regulatory efforts.

IV. THERE IS NO NEED TO ADOPT ATTRIBUTION LIMITS IN THE DBS BUSINESS THAT GO FAR BEYOND THOSE APPLIED TO OTHER VIDEO DELIVERY MEDIA.

To implement its various restrictions on DBS affiliations, the Notice proposes new attribution standards which diverge significantly from those imposed on other video delivery media. Among other things, the Notice proposes to: (1) attribute non-voting stock ownership of 5 percent or more; (2) attribute limited partnership interests based not only upon equity holding but also based upon percentages of distribution of profits; and (3) provide for attribution based upon certain management agreements and joint marketing agreements.[53] All of these ownership interests are generally not attributable under the Commission's current rules for attribution of broadcast and cable ownership interests.[54]

The Commission has provided no legal or policy justification for proposing attribution rules for DBS ownership which exceed

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[52](...continued)
Notice of Inquiry in Docket No. 95-61, 10 FCC Rcd. 7805, 7819 (1995).

[53] Notice at ¶ 48.

[54] 47 C.F.R. § 73.3555. See also In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast Interests, Notice of Proposed Rulemaking in MM Docket No. 94-150 10 FCC Rcd. 3606 (1995)("Attribution Notice"). For purposes of cross-ownership, vertical, and horizontal integration limits, the cable attribution rules are identical to those for broadcasting. 47 C.F.R. § 76.501.

those presently in place for the broadcast and cable industry. As the Commission has stated, the current attribution rules were fashioned in accordance with years of Commission experience and for the precise purpose of identifying those ownership thresholds that enable an entity to influence or control over another entity.[55] In recognition of the efficacy of the broadcast attribution rules in identifying influential ownership levels in video programming entities, the Commission expressly adopted the broadcast model for the cable cross-ownership, vertical integration, and horizontal ownership limits.[56] While the Commission has recently proposed a modification to these attribution rules, it has been for the purpose of **raising**, rather than lowering, the attribution limits.[57] Specifically in the context of attribution limits, the Commission is legally obligated to provide a detailed explanation "as to why less restrictive alternatives . . . are insufficient."[58] Absent some articulated rationale why DBS companies should be treated differently than other video programmers, the Commission is

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[55] Attribution Notice at 3619-3620.

[56] Id.

[57] The Attribution Notice specifically proposes to raise the 5 percent attribution limit for voting stock to 10 percent. Attribution Notice at 3617.

[58] Cincinnati Bell, supra, at 13.

unjustified in diverging from its long-established attribution policies.[59]

CONCLUSION

The Notice's proposed limitations on the participation of cable operators and other non-DBS MVPDs in the DBS industry represent unnecessary entry restrictions which will only serve to lessen competition in the MVPD market. The Commission lacks a legal or policy rationale for adopting such needless regulations. Rather, as Congress intended, the Commission should rely on market forces to the maximum extent possible when formulating its DBS policy.

Respectfully submitted,

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[59] See Greater Boston, supra. See also Melody Music, Inc. v. F.C.C., 345 F.2d 730 (D.C.Cir. 1965) (the Commission cannot accord different treatment to similarly situated parties without a reasonable and articulated reason for doing so).